THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. And-19-491

Adoption by Jessica M. et al.

ON APPEAL from the Androscoggin County Probate Court

BRIEF OF APPELLANT (DAD)

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STATEMENT OF THE CASE

After Petitioners filed a petition for termination of child's parents' rights and an incorporated petition for adoption, 18-A M.R.S. § 9-204 (2018),[1] the Androscoggin County Probate Court (Dubois, J.) convened a three-day evidentiary hearing and, thereafter, granted the petition to terminate Parents' parental rights. This appeal follows on behalf of Dad.

I. Summary of the argument. (1) The trial court improperly considered inadmissible, highly prejudicial statements made at Dad's criminal sentencing hearing in federal district court. The statements – findings made by the federal court about the reasons for imposing the sentence it did – were neither admissible as evidence nor suitable for judicial notice. More importantly, they were rife with unproven allegations not otherwise admitted at trial and quite damaging to Dad's case. In addition to the weight and harmfulness of the substantive allegations themselves, Dad was prejudiced by the Petitioners' use of those findings to impeach Dad's credibility in toto. There is a reasonable probability that this error affected the outcome.

[1] Other than this appeal, which is prosecuted per 18-C M.R.S. § 9 -309, the petition to terminate was litigated before the recent recodification of the Probate Code. *See* P.L. 2017, ch. 402 § A-2 (now codified at 18-C M.R.S. §§ 9-103 (jurisdiction), 9-204 (termination of parental rights), 9-302 (consent for adoption) (2019); P.L. 2019, ch. 417 § A-103 (providing that recodification is effective September 1, 2019).

(2) The second assignment of error presents another reason to question the court's credibility determination. Dad's request for a continuance so that he could testify by video was denied. Dad contends that the court's rejection of his testimony without taking the opportunity to visually assess his demeanor and credibility violates due process.

(3) In his final assignment of error, Dad claims that the court's conclusions that he is unfit and that termination is in his son's best interest are contrary to the truth of the case and are, therefore, erroneous.

II. Evidence adduced at trial. In his *pro se* letter requesting the appointment of counsel to contest the petition to terminate his rights, Dad, who was in custody of the United States Bureau of Prisons ("BOP") at a correctional facility in , noted that he could appear in person if the court ordered him to do so. *See* Dad's Letter to Court of 5/25/18. Instead, once counsel was appointed, the court put Dad's attorney in charge of "check[ing] with [the Lewiston] District Court to see if we could hold our hearing there, as there will be issues with having both parents[2] appear by video for the trial." A. 2. Before trial, Dad's counsel informed the court that

[2] Mom, who was in a correctional facility in , appeared that day by video. 1Tr. 3-4. Though she could not be seen by those in the courtroom, she could see and hear, but not speak with, those in the courtroom via that video connection. 1Tr. 3-4. Her attorney could consult with her via his cell phone. 1Tr. 4.

she had done so, but that, as far as the district court was concerned, "the request would have to come from the – this court directly to them." 1Tr. 33.

There were also problems on the BOP's side of things, as Dad's counsel explained:

> Up until this hearing there was an IT person at the [BOP] where my client is [who] was in contact with me and able to help us [have Dad appear by video]. That person has left the facility.

1Tr. 8. Dad appeared by telephone and he needed to use that line to address the court, listen to the proceedings and communicate with his attorney. 1Tr. 3-4. Dad's attorney objected that, to rule on the petition, the court needed to be able to view Dad in order to assess his demeanor and credibility. 1Tr. 17. The court interrupted counsel, "you don't need to bullshit." 1Tr. 17. Counsel persisted, explaining that the video was important not just during Dad's testimony but "throughout" the proceeding." 1Tr. 17, 18, 21, 34-35.

Counsel for Petitioners objected to the request for a continuance, arguing that video presence was not necessary, except perhaps when Parents themselves were testifying, and that a continuance would result in "further delay"[3] to the detriment of the child, 1Tr. 24-27. The court denied Parents' motion (Mom had joined it) and ordered the parties to "proceed

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[3] The trial had originally been set for two days in late February 2019 – nearly eleven months after the petition had been filed. A. 3. Thereafter, however, Petitioners sought and were granted a continuance as they had "pre-booked vacation plans with the child out of state that week." Pets' Mot. to Continue of Oct. 1, 2018.

with taking testimony today." 1Tr. 31. However, the court agreed that it was important it be able to "visual[ly] assess" Parents' case because a "credibility and demeanor analysis" was "more involved" than just listening to audio. 1Tr. 32. The court said, "I think we can keep that record open…to be able to get some means" for Parents to appear via video, assuming that was technically possible. 1Tr. 32. On the second day of trial, Dad again appeared solely by phone. 2Tr. 3.

After a four-month long break in the proceedings meant, in part, to allow the parties to arrange for Dad to appear via video, the third, final day of trial commenced with Dad again appearing solely by phone. 3Tr. 3, 14.[4] That morning, counsel again sought a continuance, explaining the considerable efforts she made and obstacles she encountered – absent BOP officials and bureaucratic delay in the district court – in attempting to secure Dad's presence via video. 3Tr. 9-10, 12. Mom joined the motion. 3Tr. 10-11. The court denied it upon Petitioners' objection. 3Tr. 12. Dad testified by phone.

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[4] In the interim, Petitioners filed, and the court granted, a Motion to Set Trial Dates, asserting that, though the Administrative Office of the Courts had approved Dad's request to hold the remainder of the trial at the district court, the district court had not set trial dates, despite Dad's attorney's request for it to do so nearly two weeks prior to the filing of Petitioners' motion. Pets' Mot. to Set Trial Dates of 6/19/19 & Order (granting) of 6/25/19. Petitioners contended that child faced "instability and impermanency" as a result of the delay. *Ibid*.

A. For the first two years of his life, child lived with his grandmother, . Child was born in 2007 to Mom and Dad. 3Tr. 114. At birth, cocaine was found in his system. 2Tr. 93; Pets' Ex. #18-C at 2. Almost immediately after his birth, Mom and Dad were in jail. 2Tr. 43. According to child's maternal grandmother, grandmother, Mom put child up for adoption. 2Tr. 81. However, grandmother testified that, when child was four or five days old, "the people that were going to adopt him brought him over to [her] house." 2Tr. 43, 81. grandmother called DHHS. 2Tr. 81. In May of 2008, when was about seven months old, the Lewiston District Court entered a jeopardy order as to Dad. Pets' Ex. #18-C. The court found that Dad had a substance abuse problem and a criminal history record including a felony-level conviction for furnishing drugs. *Id.* at 2. The court also noted that Dad was making "excellent progress" in drug court and that his three weekly visits with child were going "very well." *Id.* Via DHHS, child was officially placed in grandmother's care. *Id.* at 3; 2Tr. 43.

Dad successfully reunified with child after completing "[t]ons of services." 3Tr. 116, 119. By district court order, child s primary resident was to be Dad's home. Pets' Ex. #18-E.

B. For approximately six years, child lived with Dad. Child, who was eleven when he testified at the hearing, recalls reading and playing

video games with Dad. 2Tr. 229, 239-40. His earliest memory is a happy one: Dad walking him to pre-school. 2Tr. 258. They spent a lot of time together, sharing interests in sports and similar tastes in food and movies. 2Tr. 258-59. child remembers Dad as "always fun." 2Tr. 256. Dad recalls attending summer concerts and fireworks displays. 3Tr. 118. They attended church together. 3Tr. 118, 120-21.

There were also some rough times, too – ones Dad recognizes were a result of his own bad decisions. Specifically, Dad testified that their lives suffered after his drug relapse circa late 2011/early 2012. 3Tr. 113, 119, 121-22. During that approximately two-month period, Dad was using crack cocaine and somehow became "like the go-between" for others who were using crack. 3Tr. 121-22. A couple times, Dad used crack when child was in their home asleep. 3Tr. 123. As a result, child was exposed to "one or two" "unsafe people," although never without Dad's supervision and never leading to any "unsafe situations." 3Tr. 123-24.

During his relapse, Dad made another "bad decision," as he described it at trial, leaving child with a friend of Dad's while Dad – who worked as a part-time musician – travelled for a "gig." 3Tr. 124, 158. Coincidentally, Dad's friend incurred DHHS involvement while child was in his charge, spurring a second child protective custody case against Dad. 3Tr. 124-25,

157-58. Happily, the incident marked the end of the relapse, as Dad enrolled in a 90-day treatment program, attended AA meetings, and, in late spring 2013, moved away from . 3Tr. 113, 125-26.

While Dad was in treatment, child stayed with his godparents. 3Tr. 126. Also, when Dad and child lived in , Dad freely permitted grandmother to visit with her grandson, and she estimates she visited with child five to seven times yearly. 1Tr. 96. grandmother recalls that child also spent major holidays with her. 2Tr. 45.

Relocated to , Dad was "feeling really guilty" about his relapse. 3Tr. 129. He sees how he "dropped the ball" by allowing child to miss too much school, particularly during the 2013-2014 school year. 3Tr. 129.[5] As the court found, child s poor school attendance "adversely affected [child's] academic and social development." A. 7. child s report cards for his kindergarten through second-grade years show that child generally met or partially met most school-identified academic standards for each reporting period. *See* Pets' Exs. ##5-B through 5-G. Evidently, child's school

[5] Though he does not contest the court's findings that child "was reported absent 28 times in kindergarten, 17 times in first grade and 35 times in second grade, A. 7, Dad does not believe the second-grade records accurately account for the time child was in his, rather than grandmother 's, care. *See, e.g.*, 2Tr. 62-63 entered grandmother 's care before end of school year).

performance was not so poor as to prompt anyone to refer him for special education testing. *See*, *e.g.*, 1Tr. 83, 95.

The fallout from Dad's 2012 relapse continued into child's first-grade year, as Dad was arrested for his role in the conspiracy to distribute crack in . 3Tr. 131.[6] child was present when the federal agents arrested Dad. 2Tr. 238; 3Tr. 131. For about 30 days until the end of March 2015, Dad was in custody until he could make bail. 3Tr. 132. Fortunately, Dad was able to arrange for his friends and landlords, , to care for child 3Tr. 132. During that time, child did very well at school, showing up well rested and completing extra homework. 1Tr. 69-70.

The court found that, while in Dad's care, child received "no well[-]child checks" and only "minimal medical treatment." A. 7.[7] There was testimony that, when child was in Dad's care, he had a "skin condition" around his mouth, experienced dairy-related digestive issues, and had sore feet. 1Tr. 155-56, 161-62, 172.

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[6] Dad was the eleventh of eleven named alleged co-conspirators indicted in February of 2015. Pets' Ex. #16-B. He was charged with two counts: conspiracy to distribute cocaine, 21 U.S.C. §§ 841(a)(1) & 846 (Count 1), and maintaining a drug-involved premises, 21 U.S.C. § 856(a)(1) & 18 U.S.C. § 2 (Count 2). *Ibid.*

[7] Dad personally disputes this finding, testifying that child had a regular physician in , 3Tr. 164-65; that he brought child to annual check-ups while in , 3Tr. 165; and that child saw a dentist while in , but not in . 3Tr. 165-66.

Dad and child were deeply involved in the churchgoing community of . 3Tr. 152. Dad was a member of the "worship team" at a local church, playing the drums. 3Tr. 85-86. They developed friendships with fellow worshippers who often helped Dad and child with transportation throughout the community. 3Tr. 87. They regularly ate meals together, too. 3Tr. 89-90.

After his arrest on the federal charges, Dad attended court-ordered addiction treatment counseling weekly, then biweekly, and then monthly, as he improved. 2Tr. 6. Dad made good progress towards all the goals identified in counseling. 2Tr. 15. Drug screening revealed no positive tests for cocaine, only one positive result for THC soon after he started counseling. 2Tr. 19, 24-25. His counselor testified that the motivation "to stay clean and sober" Dad "talked about most was to be a better dad to [child than he was to his older children." 2Tr. 23.[8] With the help of his counselor, a couple of months before reporting to federal custody, Dad worked on developing a plan for where child would live while Dad was in prison, discussing "the pros and cons of different options." 2Tr. 15-16, 17-18. Dad's initial plan was for child to stay with , Dad's friends with whom child had apparently thrived when Dad was jailed after his arrest. 3Tr. 197. However,

[8] Dad has three adult daughters living outside of Maine. 2Tr. 23.

with input from grandmother, Dad agreed to leave child with grandmother, informing her of that decision just a few days before he entered federal custody. 2Tr. 61; 3Tr. 197.

After pleading guilty, Dad was sentenced to 60 months' imprisonment. Pets' Ex. #16-E at 2. He is scheduled to be released from prison in November 2020, though he anticipates being released to a halfway home in Portland in July 2020 or earlier. 3Tr. 143-44.[9]

C. Since 2016, child has been in the care of his maternal relatives. grandmother raised Mom's two other children, who, at the time of the trial, were teenagers. 1Tr. 184; 2Tr. 34. Petitioners – Mom's sister, aunt (*i.e.*, child's maternal aunt) and her husband, uncle – began to spend more time with child when he entered grandmother's care. 1Tr. 149. They began tutoring child and spending time with him on the weekends. 1Tr. 149. Also, because grandmother is a widow and "older," Petitioners were motivated to take more responsibility for child 1Tr. 151; 3Tr. 20. By November 2016, child was spending weekends at Petitioners' home. 1Tr. 149.

In late winter or early spring of 2017, Petitioners asked Dad, who was in prison, if it was okay for them to have child reside with them. 1Tr. 152. Dad, who had never met Petitioners, called grandmother, who assured him that child

9 The court's finding, at A. 8, that Dad "will not be released until November 2020 at the earliest," seemingly evinces its rejection of Dad's testimony on this point.

knew and seemed to get along well with Petitioners. 2Tr. 73. This information seemed to assure Dad of the new arrangement. 2Tr. 73. Dad also called his friend who had met aunt and uncle , to hear the friend's impressions of Petitioners as prospective caregivers for child 3Tr. 94-95. Dad consented to the arrangement, and child moved in with Petitioners in May 2017. 1Tr. 149, 152. At their request, in April of 2017, Dad granted Petitioners general powers of attorney to undertake all affairs necessary for child' s well-being. 1Tr. 152-53; Pets' Ex. #10.

Just a few months later, Petitioners began the process to become child s legal guardians. 1Tr. 207. Dad again consented to Petitioners' request, and, in January 2018, the guardianship was finalized. 1Tr. 148, 220; 3Tr. 95, 111. Nobody has ever sought to terminate the guardianship. 2Tr. 150; 3Tr. 45. Petitioners have "had everything [they] need to meet [child s] needs" by virtue of the guardianship. 3Tr. 62. Dad wants the guardianship to stay in place. 3Tr. 151, 224. Dad testified that it would be perhaps two or three years for him to work and build up his financial resources until he might be in a position to seek to terminate the guardianship, though he planned on being a positive influence in child s life in the interim. 3Tr. 228-32.

1. child is doing well in Petitioners' care. Dad is "happy and thankful" that Petitioners have been able to provide child with such good care. 3Tr. 141. Petitioners testified that, during the roughly two years they've had child he seems happy, 1Tr. 170; has grown socially, 1Tr. 167; 3Tr. 26; has improved his school performance, 1Tr. 164; 3Tr. 23; has been physically healthy, 1Tr. 162, 177-78. child told the court that, after speaking with Petitioners about the possibility of adoption, he wants to be adopted, although the parties disputed whether child understood the difference between adoption and guardianship. 2Tr. 255; A. 88-89, 94, 103.

2. Communication between child and Dad.[10] For the first month or two of child s time with Petitioners, Dad called and spoke with child every seven to ten days. 1Tr. 196-97. Petitioner also called aunt and spoke with her frequently at this time, asking for help obtaining his legal records. 1Tr. 195-96.[11] Then, from sometime in June until September of 2017, as Dad was relocated in the secure housing unit ("SHU") in prison for his own safety, there was no communication between Dad and child 1Tr. 189, 197; 3Tr. 147,

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[10] Dad goes to some length to discuss his communications with child as the supposed lack of such communications *might* form the basis of the court's *possible* conclusion that Dad "abandoned" child *See* A. 9; *see infra* n. 16 (for discussion of lack of clarity in court's order regarding abandonment).

[11] This corroborates Dad's testimony that, when he was at – a "gang-active" prison – he was desperate to obtain legal documents that would prove that he had not cooperated with prosecutors in exchange for a lesser sentence. 3Tr. 212-13.

213-15. Dad was moved to a different federal facility in . 1Tr. 207; 3Tr. 112.

From September of 2017 through the end of the year, Dad called child a "handful" of times, according to aunt . 1Tr. 197. During this time – May 2017 through June 2018 (except for the time he spent in the SHU) – Dad also communicated with child via text message (to aunt 's phone). 1Tr. 202. The text messages followed a pattern similar to the phone calls: a couple times a week at first, none at all while in the SHU, a couple times a month throughout the fall of 2017, none during January of 2018,[12] and a couple times a month through June 2018. 1Tr. 203, 209.

Dad believes that the text messages and phone calls were more frequent than these estimates, offered by aunt , but that the prison service ("CorrLinks") does not archive messages very long. 3Tr. 208-09, 211, 223; Dad's Ex. #1-A (text messages saved for only 30 to 60 days). He believes his call records for early 2019 suggest that he called aunt more often than her testimony suggests. *See* 2Tr. 178-79; 3Tr 56-57.

[12] In January 2018, Dad was again in the SHU, this time as a punishment for being found with a knife, which he claims was his cellmate's. 3Tr. 146-47.

Petitioners stopped paying for the text message service in March or April of 2018[13] – nearly coinciding with their filing of the instant petition to terminate Dad's parental rights in late March of that year. A. 34; 1Tr. 202. Petitioners offered many reasons for doing so: without texts, it was easier "to track [Dad and child's communication] for the purpose of the court," 3Tr. 58; child "responds much better to letters," 3Tr. 49; aunt "felt a little awkward getting text messages from a federal prison," 3Tr. 205; child would "start to regress" from the disruption of a message, 1Tr. 205; "a couple of times" the system delayed the delivery of text messages until the middle of the night, which made it "obtrusive to [aunt 's] life," 2Tr. 167, 1Tr. 202, 205; "it really didn't work for [aunt]," 1Tr. 205. Upon cancelling the service, aunt wrote Dad a letter that said, "we should communicate by mail from now on." 1Tr. 206.

But, four months after the text service ended, Dad asked in a letter why nobody was responding to his emails. 1Tr. 207-08. aunt logged onto CorrLinks and discovered that Dad had written four short emails to child dated from early October 2018. 1Tr. 207-08; *see* Dad's Exs. ##4-7. aunt immediately "just deleted them and [she] closed that account." 1Tr. 208. In

[13] The service apparently remained active through June 2018, and Dad was sending messages to child that month, including one sent on June 25, 2018. 1Tr. 209; Dad's Ex. #8.

her words, she did so "[b]ecause I had already asked that we communicate through writing letters." 1Tr. 208.

So, Dad began to write letters to child with more frequency. *See*, *e.g.*, Pets' Exs. ##1-A through 1-E; Dad's Exs. ##30 & 31; 3Tr. 65-67, 140, 204 ("I sent more than a few letters.") He also called and spoke with child in November and December of 2018. 1Tr. 198. Though aunt testified that Dad called child only twice (one of which she did not answer while the family was at the airport) in 2019 prior to the first day of trial, 1Tr. 198-99, Dad believes he called aunt's phone at least fifteen times during the first three months of 2019. *See* 2Tr. 178-79; 3Tr. 56-57. Phone calls between child and Dad tend to last about two to three minutes apiece, a length grandmother testified is appropriate for child s age and maturity. 1Tr. 199; 2Tr. 112-13.

All means of communication from prison cost Dad money. 3Tr. 137, 212; 2Tr. 179. For example, a phone call that can last up to 15 minutes costs $3. 3Tr. 208. It costs prisoners money to log-on to CorrLinks and more money for them to send or receive text messages via CorrLinks, in addition to the need for the person on the other end of those services to pay for their use. 3Tr. 96, 212. Dad only recently began a paying job in prison – one that pays him $6 a month. 3Tr. 203. Dad's friends have recently sent him on order of $40 or $50 every four or five months. 3Tr. 203.

III. The disputed sentencing transcript. On the third day of trial, Petitioners' attorney was cross-examining Dad when she strayed into questions about findings she believed Judge John A. Woodcock, Jr. made at Dad's sentencing hearing in the United States District Court. 3Tr. 173. Petitioners' counsel "move[d] to admit" Petitioners' Exhibit #20, which she purported was a transcript of that sentencing proceeding. 3Tr. 174. Dad's counsel immediately objected, specifically "on relevance and hearsay grounds." 3Tr. 174. The court quickly responded that, "I think the Court can take judicial notice" of the transcripts. 3Tr. 174. Following the court's lead, Petitioners' counsel argued that "the Court may take judicial notice of other court records…and admit pertinent findings made at different proceedings if they meet the requirements of collateral estoppel…." 3Tr. 174.

Dad's counsel objected, "What the judge's thoughts were in imposing that sentence doesn't get to come into evidence here." 3Tr. 177. "It's all hearsay," she added. 3Tr. 175, 176, 180. She added, "none of it was under oath…." 3Tr. 175. Discussing M.R.Evid. 201, counsel noted that the portions of the transcript offered by Petitioners were "not memorialized in an order." 3Tr. 175, 177, 178. She argued that just because Dad was present at the hearing and had an opportunity to challenge Judge Woodcock's findings, that "doesn't mean everything [in the transcripts] is true." 3Tr. 181.

Petitioners' attorney narrowed her request down to the court's findings "from page 25 [of Petitioners' Exhibit #20] on...." 3Tr. 178. She wanted the court to consider the Judge Woodcock's statements about "why [Dad] was sentenced for the period of time that he was sentenced [and]...the different factors and why he imposed sentence as he [did]...." 3Tr. 178. "I believe that...the Court may take judicial notice of that." 3Tr. 179.

The court ruled:

> All right. To the extent that there's anything in that document that relates to argument by counsel, et cetera, then that's – I'll sustain the objection to that. But I'm going to admit[14] the document as it relates to the [Judge Woodcock's] findings placed on the record in that matter.

3Tr. 180. Specifically, the court ruled that it would consider anything from page 25 on of Petitioners' Exhibit #20 that it deemed to be a finding, which definitely included everything from page 42, line 23 onwards. 3Tr. 183-84 ("The only thing that comes in could be the Court's findings and conclusions....")[15]

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[14] Respectfully, the court's use of "admit" is imprecise and belies its evident thought-process – to take *judicial notice* of the exhibit. *See*, *e.g.*, 3Tr. 174 ("I think the Court can take judicial notice....") There was certainly no foundation laid as to its admissibility as evidence. Nor did the court conduct any analysis about whether the exhibit was self-authenticating, *see* M.R.Evid. 902, or discuss Dad's counsel's repeated hearsay objections. 3Tr. 173-77, 179-80, 182.

[15] There is some ambiguity in the court's ruling. After stating, "[t]he only thing that comes in would be the Court's findings and conclusions," 3Tr. 184, the court noted that the parties disputed where those "findings and conclusions" began in the transcripts. 3Tr. 184-85. Regardless of that dispute, the court stated, "my ruling stays the same": "[t]he

As a result of the court's ruling, it is impossible to know for sure which findings the court considered, but here are a few it certainly viewed and might have considered:

- At some point while living in , Dad "became involved with the ." Pets' Ex. #20 at 28. The are "a violent street gang" based in and affiliated with the . *Id.* at 32. Their members led a conspiracy to distribute crack and heroin and deal with illegal firearms. *Id.* at 33, 36.
- Dad was "selling crack cocaine in in 2012." *Ibid.*; *Id.* at 32. He was "one of" the "local dealers" involved in distributing "enormous quantities" of crack in . *Id.* at 32, 33, 35. Crack dealers like Dad are "not a high form of life." *Id.* at 35. Dad was responsible "for distributing $3,000 of crack cocaine per week for a total of 4 months" – an "extremely intense" volume. *Ibid.*
- Over the course of about four months in 2012, Dad and his roommate "allowed the gang members and others to stay in their

argument of counsel, et cetera, that precede those pages do not come in as evidence." 3Tr. 184. The court ruled it would conditionally admit the entire document "commencing on page 25," subject to its review, "but if it's not an *order* of the court, then it's not coming in." *Ibid.* (emphasis added). Based on everything that preceded the court's talk about "order[s] of the court," Dad believes the court simply misspoke, and that it admitted all of Judge Woodcock's findings. It is clear from Petitioners' heavy citation to those findings in their proposed order, that they, too, interpret the court's ruling in the same manner. Otherwise, they purposefully cited to unadmitted evidence in that proposed order.

apartment and to deal crack cocaine out of their apartment and also to store their crack there." *Ibid.*; *Id.* at 36. "[D]uring the time that he was dealing, his own son was living with him and was exposed to the drug dealing, the drug taking, and these violent, difficult criminals...." *Id.* at 36. Judge Woodcock couldn't get "an image out of [his] head" – the "image of a three-year-old boy running around an apartment with drug dealers, one of whom was his father." *Id.* at 38.

- Based on Dad's past, there is "little reason to believe this time be different" such that, when he is released from prison, he will not again start committing crimes. *Id.* at 34, 37.
- In light of the "level and intensity of his criminal activity," Dad "has been treated remarkably gently by the [s]tate court systems in both and in Maine." *Id.* at 31.
- Dad "owes over $115,000 in child support payments." *Id.* at 29. Dad hasn't financially supported his own daughters. *Id.* at 41.
- Dad once drove "a motor vehicle while he was high on crack." *Id.* at 35.

Petitioners' "Proposed Findings of Fact & Conclusions of Law" invited the court to rely on many of these findings. *See* A. 72-74, 80-81, 82. But, in addition to holding up the above-noted findings as substantive evidence,

Petitioners invited the court to dock Dad's credibility where he strayed from Judge Woodcock's view of things. *See* A. 74, ¶ 12 ("his denials are contrary to the federal court's findings"); 75, ¶ 16 (asserting that Dad's testimony was "contrary to the federal court's findings"); 82, ¶ 60 (inviting court to find that "it has serious reservations about the credibility of [Dad's] testimony in light of his outright denial of facts relating to his current prison sentence, and his minimization of his past substance abuse, criminal history….")

In his closing argument, Dad renewed his objection to the court's consideration of the sentencing transcript and objected to Petitioners' use of that transcript in their proposed findings. A. 89, n. 1.

IV. The court terminated Dad's parental rights. After the parties filed closing arguments/proposed orders, the court granted the petition, concluding that Dad was unfit because he was unable to "meet the needs of [child] within a time reasonable [sic] calculated to meet his needs" and (2) abandonment[16] as a result of Dad's "fail[ure] to maintain any

[16] Respectfully, the court's order lacks precision about whether Dad was unfit because he abandoned [child] While the court explicitly wrote that Mom "has abandoned the child," A. 7, it was ambiguous as to Dad. In one paragraph, the court wrote that, "Abandonment may form the basis of a termination of parental rights if 'any conduct on the part of the parent showing an intent to forgo parental duties or relinquish claims' including a failure to communicate meaningfully or to maintain regular visitation for at least six months [sic]." A. 9. A paragraph later, amidst a discussion of its findings and conclusion about Dad's ability to meet child s needs, it wrote, "Further, the Court finds by clear and convincing evidence that [Dad] has failed to maintain any meaningful communication with [child during his period of incarceration." *Ibid*. It did not proceed to the next step necessary in the abandonment analysis, *i.e.*, whether that lack of

meaningful communication with [child] during his period of incarceration." A. 9. The court concluded that termination of Dad's rights is in child s best interests. *Ibid.*

ISSUES PRESENTED FOR REVIEW

I. Whether the court committed reversible error by considering a federal court's findings made at Dad's criminal sentencing hearing.

II. Whether the trial court violated Dad's due process rights by rejecting portions of his testimony without visibly assessing his demeanor and credibility.

III. Whether there is insufficient evidence to support the order of termination.

ARGUMENT

First Assignment of Error

I. The court committed reversible error by considering a federal court's findings made at Dad's criminal sentencing hearing. The basis for the court's consideration of the sentencing transcripts – either admission as evidence or judicial notice – is unclear from

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meaningful communication evinced, by clear and convincing evidence, that Dad "inten[ded] to forego parental duties or relinquish parental claims." *See* 22 M.R.S. § 4002(1-A). Ambiguity as to what a court has concluded as a matter of law is grounds for vacatur and remand. *See Phaiah v. Town of Fayette*, 2005 ME 20, ¶ 12, 866 A.2d 863.

the record. In either case, however, the court's consideration was erroneous. It was also not harmless.

This Court generally reviews "evidentiary rulings for clear error or abuse of discretion," *In re Jonas*, 2017 ME 115, ¶ 37, 164 A.3d 120, the former standard of review reserved to evaluate trial courts' determinations of evidentiary relevance. *State v. Dolloff*, 2012 ME 130, ¶ 24, 58 A.3d 1032. A court "'abuses its discretion when it makes an error of law.'" *State v. Hussein*, 2019 ME 74, ¶ 10, 208 A.3d 752 (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)).

A. The court's consideration of the sentencing transcript is an error of law. The record suggests that the court believed it could take "judicial notice" of portions of the sentencing transcript; however, the court ruled that it would "admit" those portions, presumably as evidence. 3Tr. 180; *see supra* n. 14. Because the court itself was the fact-finder, the distinction made little difference at trial. Dad now analyzes the lawfulness of both possibilities.

1. The court was not authorized to take judicial notice of any part of the sentencing transcripts. M.R.Evid. 201, which governs judicial notice, is much more restrictive than the court's ruling suggests. This Court has noted the

> inaccurate, shorthand use of the term 'judicial notice' by counsel who simply wish the court to accept facts or evidence that is outside the actual evidentiary record – for example, where a companion case has already proceeded to trial and incorporation of the record in that first case would create efficiencies in the second. Although, the parties may agree to submission of that record in evidence in the newer matter, it is not done through the application of judicial notice. Judicial notice is a narrow concept that requires specific findings as provided in M.R.Evid. 201(b); it should not be referenced except in circumstances that truly constitute judicial notice.

Cabral v. L'Heureux, 2017 ME 50, ¶ 11, n. 4, 157 A.3d 795.

The "[k]inds of facts that may be judicially noticed" are those "not subject to reasonable dispute" because, either (1) they are "generally known within the trial court's territorial jurisdiction" or (2) they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." M.R.Evid. 201(b). This second category allows courts to take "notice of a final judgment, from a Maine court or another court of competent jurisdiction[;] however, that 'notice' is limited to the existence of the judgment, and the [judicial] action of the court." *In re Jonas*, 2017 ME 115, ¶ 38, n. 10. "[T]he *factual findings* contained within a judgment are not appropriate subjects for judicial notice." *Ibid.* (emphasis in original); *Cabral*, 2017 ME 50, ¶ 11 (A court "cannot, under the rubric of judicial notice, simply *sua sponte* import and rely on evidence presented in an earlier judicial proceeding.")

Here, to the extent the court's ruling embraces judicial notice, it is erroneous. The court ruled that it could consider Judge Woodcock's factual findings, just as Petitioners invited him to do. 3Tr. 174-84.

2. The sentencing transcripts were not admissible evidence. Respectfully, Petitioners and the court seemed to conflate judicial notice with the doctrine of collateral estoppel. *See* 3Tr. 174, 176, 181-83. Generally, collateral estoppel "'prevents a party from relitigating factual issues already decided if the identical issue necessarily was determined by a prior final judgment, and the party estopped had a fair opportunity and incentive to litigate the issue in the prior proceeding.'" *In re Jonas*, 2017 ME 115, ¶ 38, n. 10 (quoting *Kurtz & Perry, P.A. v. Emerson*, 2010 ME 107, ¶ 16, 8 A.3d 677). A court may "admit pertinent *findings* made in a different proceeding if those findings meet the requirements of collateral estoppel...." *Cabral*, 2017 ME 50, ¶ 11 (emphasis in original).

However, Petitioners' assertion of collateral estoppel runs headlong into an insurmountable hurdle: A "prior finding by [the] preponderance standard cannot be given collateral estoppel effect in [a] proceeding governed by [the] clear and convincing standard." *In re Michaela C.*, 2002 ME 159, ¶ 43, 809 A.2d 1245 (Dana, J., dissenting) (citing *Grogan v. Garner*, 498 U.S. 279, 284-85 (1991) and Restatement (Second) of Judgments § 28(4)

(1982)); *see also In re Scott S.*, 2001 ME 114, ¶ 14, 775 A.2d 1144 (though child protective custody courts may uniquely consider findings of different judges at prior stages in the unified proceeding, "a cautionary note" is in order given the "shifting burdens of proof in these unique proceedings"). That is what we have here – a termination proceeding requiring clear and convincing proof, 18-A M.R.S. § 9-204(b) (2018) & 22 M.R.S. § 4055(1)(B)(2), and a federal criminal sentencing hearing based on proof by merely a preponderance of the evidence. *United States v. Nagell*, 911 F.3d 23, 29 (1st Cir. 2018). Estopping Dad from contesting Judge Woodcock's findings in this scenario would effectively reduce Petitioners' burden of proof.

The "findings" from the sentencing transcript are also inadmissible for other reasons. For one, no foundation was established, and it is unclear that Pets' Ex. #20 "is what the proponent claims it is." M.R.Evid. 901(a). Because it lacks any sort of seal or other qualifying indicia of certification, it is not self-authenticating. M.R.Evid. 902. Even if it were authenticated, "[t]his is a separate question from [its] admissibility in evidence as an exception to the hearsay rule…." Advisory Note to M.R.Evid. 902 (February 2, 1976).

Judge Woodcock's "findings" are hearsay to the extent that they are offered for the truth of the matter asserted – *i.e.*, that Dad did what the judge

said he did. *See* M.R.Evid. 801 & 802. But they are also multi-layered hearsay statements, presumably comprised of codefendants', investigators', and prosecutors' statements to Judge Woodcock about what Dad did. For instance, the simple assertion that Dad sold, trafficked, or distributed crack cocaine (rather than conspired to do so) comes, on this record, from Judge Woodcock's understanding of what others told him Dad had done. On this record, Dad's guilty plea – to one count of *conspiracy* to distribute – does not evince anything other than the elements of that crime, which do not include selling, trafficking, or actual distribution. *United States v. Green*, 698 F.3d 48, 56 (1st Cir. 2012) (holding that elements of conspiracy to distribute include "(1) a conspiracy existed; (2) [the defendant] knew of the conspiracy; and (3) [the defendant] voluntarily participated in the conspiracy.") Everything else comes from hearsay – and multi-layered hearsay at that. Consequently, there is no wriggle room for the court to admit Judge Woodcock's findings into evidence. The court erred as a matter of law in doing so, and that is an abuse of discretion.

B. The court's error is not harmless. "[I]n the context of a termination of parental rights proceeding," an error is harmless only when the party seeking termination can persuade this Court "that it is highly probable that the error did not prejudice the parents or contribute to the

result in the case." *In re Scott S.*, 2001 ME 114, ¶ 28. Petitioners' "burden of persuasion is high. Any doubt will be resolved in favor of the parent." *Ibid.*; *see also* M.R.Civ.P. 61.

There are three general factors that militate against harmlessness in in this case. *First*, the findings the court considered are far from cumulative; they are the only source of several "facts," detailed above in the statement of the case. *Cf. Banks v. Leary*, 2019 ME 89, ¶ 18, 209 A.3d 109 ("[A] trial court's error in relying on improperly admitted evidence is harmless when the improperly admitted evidence is cumulative to competent evidence in the record.") *Second*, the findings contain highly prejudicial information, the kind that tends to sway fact-finders. *See United States v. Hall*, 858 F.3d 254, 265-66 (4th Cir. 2017) (noting how "prior 'bad act' evidence" "will overly influence the finders of fact and thereby persuade them 'to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.'" quoting *Michelson v. United States*, 335 U.S. 469, 475-76 (1948)).

Third, Petitioners invited the court to consider the erroneously admitted findings not just substantively, but for purposes of impeaching Dad's testimony at trial. By effectively impeaching Dad via erroneously

admitted evidence, the court allowed its credibility determination as to Dad's testimony writ large to be improperly influenced.

Citing Judge Woodcock's findings, Petitioners repeatedly argued in their closing argument that Dad's testimony was "contrary to the federal court's findings." A. 73-74. Petitioners invited the court to find Dad's testimony untrustworthy because of "his lack of ownership for his past actions in light of his outright denial of facts relating to his current prison sentence, and his minimization of his past substance abuse, criminal history, and punishment in prison for a knife found in his shoe." A. 82. They encouraged the court to find, "[Dad] continues to take little accountability for his actions, which concerns the Court with respect to his future prospects for change." *Ibid.* Clearly, from the standpoint of Petitioners, Judge Woodcock's findings were quite important.

As the court itself acknowledged while ruling on another issue, its determination of Dad's credibility was consequential to the outcome. *See, e.g.*, 1Tr. 32. Its order terminating Dad's rights reflects that the court ultimately rejected significant portions of Dad's testimony. For instance, Dad's testimony that he anticipates being released in July 2020, 3Tr. 143-44, was not credited by the court. A. 8 (finding that Dad "will not be released until November 2020 at the earliest"). Likewise, the court's conclusion that

Dad "has failed to maintain any meaningful communication with [child during his period of incarceration," *ibid*., suggests that it rejected Dad's testimony about the frequency with which he initiated communications with child *See*, *e.g*., 3Tr. 204, 209-11, 223. Such apparent rejection of Dad's testimony on some of the most important aspects of the case suggests that the court's error "had the potential to affect the outcome of the case." *In re Scott S.*, 2001 ME 114, ¶ 30. The remedy is to vacate.

Second Assignment of Error

II. The trial court violated Dad's due process rights by rejecting portions of his testimony without visibly assessing his demeanor and credibility. As this Court has observed in the termination context:

> The fact finder must be able to assess the parent's demeanor and credibility, the quality of the parent-child relationship and other intangible factors in determining whether the parent is unfit. Given the complexity of this task and the risk of error inherent in such a determination it is difficult to imagine how parental unfitness can constitutionally be evaluated in the parent's absence.

In re A.M., 2012 ME 118, ¶ 20, n. 2, 55 A.3d 463 (quotation marks omitted) (quoting Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty-State Analysis*, 30 J. FAM. L. 757, 780 (1991); *In re Child of Nicholas G.*, 2019 ME

13, ¶ 21, n. 7, 200 A.3d 783. Because of the significance of the right to parent one's child, "[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is…a commanding one." *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 27 (1981). The Fourteenth Amendment and the Maine corollary do not permit a trial court to reject Dad's testimony and determine that he is unfit without having visually assessed his demeanor.[17]

To weigh parents' due process rights in the context of termination cases, both the United States Supreme Court and this Court have previously considered the factors adumbrated in *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Lassiter*, 452 U.S. at 27-31; *Santosky v. Kramer*, 455 U.S. 745, 754, 758-68 (1982); *In re Adoption of Riahleigh M.*, 2019 ME 24, ¶¶ 17-27, 202 A.3d 1174. These factors weigh in favor of Dad's contention: due process restricts a court that has not visually assessed a parent's testimony from rejecting that testimony in the course of determining that parent is unfit.

A. Dad's interest in retaining his right to parent "is commanding." *Santosky*, 455 U.S. at 758. It "is an interest far more precious than any property right." *Ibid.* Its fundamental nature is "plain beyond the need for multiple citation." *Lassiter*, 452 U.S. at 27.

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[17] This issue, "an alleged constitutional violation[]," is reviewed de novo. *In re Child of Nicholas G.*, 2019 ME 13, ¶ 19.

B. Rejection of Dad's testimony without visually assessing his credibility creates a considerable risk of erroneous deprivation of Dad's right to parent. As the Supreme Court of Nebraska has observed, telephonic appearances deprive the fact-finder of insights vital to its demeanor-and-credibility analysis:

> The wordless language of a witness' demeanor is an important tool for evaluating credibility. Even the best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried. Of course, a witness' aural mannerisms are observable telephonically. But a decisionmaker who can hear but not see a witness does not get the whole picture: Over the phone, the fact finder cannot see the way a witness sits, shifts around, or blushes. Over the phone, the fact finder cannot observe if the witness shakes nervously, smiles maliciously, or grimaces with pain.

Melanie M. v. Winterer, 862 N.W.2d 76, 84 (Neb. 2015) (internal quotation marks omitted); *In re Interest of Gust*, 345 N.W.2d 42, 45 (N.D. 1984) ("[I]n testimony by telephone, the trier of facts is put in a difficult, if not impossible, position to take into the account the demeanor of the witness in determine the witness' credibility.") Thus, courts that have considered the issue have overwhelming held that, *when a witness's credibility is of central importance*, due process requires fact-finders to visually assess it.[18]

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[18] *Melanie M.*, 862 N.W.2d at 85 (because "[c]redibility does not play a large role in every welfare case," "the risk of erroneous deprivation is not so great that a face-to-face hearing…is constitutionally required"); *Evans v. State, Taxation & Revenue Dep't, Motor Vehicle Div.*, 922 P.2d 1212, 1214-15 (N.M. Ct. App. 1996) ("Existing case law confirms the importance of in-person hearings when critical credibility determinations are at stake.");

This case came down to whether the court believed Petitioners' allegations of unfitness or Dad's testimony refuting them. Petitioners marshalled evidence that Dad made feeble attempts to communicate with child and was plotting to terminate the guardianship as soon as he is released from prison. Dad denied these allegations. The court was left to resolve two contradictory bodies of evidence by deciding whether it believed Dad's testimony. In other words, credibility was the deciding factor in this case. Following the lead of courts elsewhere, this Court should conclude that the court's inability to meaningfully assess Dad's credibility created a significant risk that the court erroneously deprived Dad of his constitutional right.

Whitesides v. State, 20 P.3d 1130, 1139 (Alaska 2001) (in context of administrative hearings about revocation of driving license "in-person [rather than telephonic] hearings are required by due process in cases where the credibility of a party is in question"); *Bigby v. United States INS*, 21 F.3d 1059, 1064 (11th Cir. 1994) ("[W]hen credibility determinations are not in issue, an immigration judge may hold a hearing by telephonic means."); *Dep't of Transp. v. Gibbar*, 155 P.3d 1176 (Idaho App. 2006) (in context of administrative hearings about suspending driver license, a "telephone hearing posed no risk of erroneous deprivation of [the driver's] license because credibility was not in issue."); *State ex rel. Human Servs. Dep't v. Gomez*, 657 P.2d 117, 118, 124 (N.M. 1982) (in context of welfare benefit hearing, hearing officer need not see testimony of beneficiary when credibility is "a minimal factor"); *see Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. 2017) ("Evaluation of a witness's credibility cannot be had without some form of presence, some method of compelling a witness to stand face to face with the fact finder in order that it may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.") (quotation marks and brackets omitted); *Cf. Richard B. v. State*, 71 P.3d 811, 833 (Alaska 2003) (due process does not require incarcerated parent to be transported to termination of parental rights trial in all circumstances).

C. In this private termination/adoption, the State has a negligible interest in preventing the court's visual assessment of Dad's credibility. "In most instances, the jails and the courts [already] have both the equipment and well-established procedures to enable video court appearances from the jails." *In re A.M.*, 2012 ME 118, ¶ 9, n. 1; *see Doe v. University of Southern California*, Cal.Rptr.3d 146, 164 (Calif. 2nd Div. Ct. App. 2018) ("We recognize the added burden…that would result from requiring an in-person or videoconference interview. However, given the available videoconference technologies like Skype, the additional burden is not significant.") Admittedly, as Dad's counsel represented on the first and final days of trial, while video testimony was technically possible in this case, BOP officials and district court bureaucracy got in the way. 1Tr. 32-34; 3Tr. 10, 12. Moreover, there is no indication that the court reached out to the district court, the Administrative Office of the Court, or BOP – a step that, respectfully, should have occurred before compromising Dad's due process rights.[19] And, Petitioners' protestations about delay are not convincing

[19] The docket record entry for April 11, 2019 states that, if Dad's attorney could determine whether video testimony at the district court was viable, "[the court] will coordinate with them to hold the remaining part of trial at Lewiston District Court." A. 3-4. However, as Petitioners confirm in their Motion to Set Trial Dates, *the day after the second day of trial*, Dad's attorney "confirmed that the District Court has the capacity to video conference to the federal prison system," yet the court did not take the lead and "coordinate" video testimony at the district court.

considering how Petitioners had themselves already sought and received a continuance of the trial so that they could go on vacation, postponing the trial more than a year past the filing of the petition to terminate. Moreover, the undisputed testimony was that, at least until Dad is released from prison (according to the court's own findings, no earlier than November 2020), there is no risk or detriment to child by remaining in the guardianship. While, at some point, the court and the parties will obviously need finality, such a need was not yet so pressing as to outweigh the other *Mathews* factors. Respectfully, the court erred, requiring vacatur with a mandate that the court play an active role in securing Dad's testimony in a manner that allows for visible assessment of his credibility.

Third Assignment of Error

III. There is insufficient evidence to support the order of termination. Dad contests each of the court's three legal conclusions: (A) that Dad is unfit because he "will [not] be in a position to meet the needs of [child within a time reasonable [sic] calculated to meet his needs;" (B) that Dad is unfit because he abandoned[20] child by "fail[ing] to maintain any meaningful communication with [child during his period of incarceration;" and (C) that "[t]ermination of [Dad's] parental rights is in [child's] best

[20] Assuming, *arguendo*, that is what the court concluded. *See supra* n. 16.

interests." A. 9. In each case, the court's conclusions constitute error and its ultimate decision to terminate Dad's rights is an abuse of discretion. This Court will review as follows:

> We review factual findings that termination of parental rights was in the children's best interests for clear error and the ultimate decision to terminate parental rights for an abuse of discretion. We review factual findings that a parent is unfit or otherwise incapable of parenting for clear error and will determine that a finding is unsupported only if there is no competent evidence in the record to support it; if the fact-finder clearly misapprehended the meaning of the evidence; or if the finding is so contrary to the credible evidence that it does not represent the truth of the case. In addition, when fundamental rights are at stake, findings may be determined to be insufficient or the court may be found to have erred in the exercise of its discretion if important issues that arise during trial are not addressed in the record or in the court's findings.

Adoption of Isabelle T., 2017 ME 220, ¶ 30, 175 A.3d 639 (internal citations omitted); *but see In re Children of Nicole M.*, 2018 ME 75, ¶ 12, 187 A.3d 1 (stating that this Court reviews a best-interests conclusion for an abuse of discretion).

A. The court's conclusion that Dad cannot satisfy child's needs within a time reasonably calculated to meet child's needs "does not represent the truth of the case." Everyone – Petitioners, included – agrees that child is being well cared for *because of* the legal guardianship that Dad consented to. 2Tr. 187-88. aunt testified that, *because of the guardianship*, she and uncle have "had everything [they've]

needed" to meet child's medical and educational needs. 2Tr. 186. The court erred by not concluding that, by virtue of the guardianship he consented to, Dad *is* providing for child s needs.

Following the lead of the Texas Supreme Court, this Court ought to acknowledge that parents who are incarcerated may nonetheless adequately provide for their children's needs by making appropriate arrangements for the children to be cared after by others for the duration of the parents' incarceration. *See In the Interest of H.R.M.*, 209 S.W.3d 105, 110 (Tex. 2006) (recognizing that an incarcerated parent's "provision of support" for their children may "come from the incarcerated parent's family or someone who has agreed to assume the incarcerated parent's obligation to care for the child."); *see In re Alijah K.*, 2016 ME 137, ¶¶ 12 & 18, 147 A.3d 1159 (noting importance, in termination cases, of "the availability of family members who were ready, willing, and able to care for the child while the father was incarcerated"). For example, an incarcerated parent's consent to have his mother and brother named "possessory conservators with visitation rights" is sufficient to rebut the inference that he is unable to care for his child. *In re E.S.S.*, 131 S.W.3d 632, 640 (Tex. App.-Fort Worth 2004). Otherwise, this Court will foreclose an incarcerated parent's chances of retaining his or her parental rights across the board.

Rather, Petitioners' concern is what *might* happen in the future – if Dad is released, successfully terminates the guardianship, and child s well-being suffers as a result. *See* 3Tr. 43, 45. But, the court's own findings – Dad, *personally*, will be unable to care for child within a time reasonably calculated to meet child s needs – foreclose such a worst-case scenario. By statute, even if he wanted to, Dad could only terminate the guardianship if doing so was in the best interest of child a possibility the court's own finding precludes. 18-C M.R.S. § 5-210(4); *see also In re Guardianship of Jeremiah T.*, 2009 ME 74, ¶ 21, 976 A.2d 955 (noting statutory presumption in favor of continuing a guardianship). Such internal inconsistency underscores the fact that the court's conclusion does not reflect the truth of the case.

B. The court's conclusion that Dad abandoned child is clearly erroneous. Dad contends that ambiguity in the court's order about abandonment is grounds for remand. *See supra* n. 16. If this Court disagrees, Dad argues that the court's conclusion that Dad abandoned child stretches the statutory meaning of abandonment beyond its breaking point and, therefore, does not represent the truth of the case.

Because this is a private adoption case in which Dad has been accorded no opportunities for rehabilitation or reunification, a particularly "rigorous application of quality of evidence standards" must inform this Court's

review. *Adoption of Isabelle T.*, 2017 ME 220, ¶ 14. Had DHHS been involved, Dad's contact with child would have been characterized by court-mandated facilitation, rather than the discontinuation of communication services (*e.g.*, text message and email) that Dad was actively using to communicate with child and concerns that Petitioners have purposefully dodged Dad's phone calls.

"In considering the parental fitness of an incarcerated parent, the court's focus is not on the usual parental responsibility for physical care and support of a child, but upon the parent's responsibility or capacity to provide a nurturing parental relationship *using the means available*.") *In re Child of Ronald W.*, 2018 ME 107, ¶ 10, 190 A.3d 1029 (quotation marks omitted; emphasis added). Even under Petitioners' view of the evidence, Dad has tried to communicate with child though perhaps not always via the medium or with as much sophistication as Petitioners would prefer. Though his texts may have been simplistic and his phone calls short, that does not mean they were not meaningful. *See* 2Tr. 112-13 (grandmother says 2-3-minute calls are appropriate for child *see Z.L.R. v. Greene County Juvenile Office*, 306 S.W.3d 632, 636 (Mo. Ct. App. 2010) (trial court erred in determining incarcerated father abandoned child to whom undisputed testimony demonstrates he sent six or seven cards holiday cards, other cards when child

was ill, and spoke with child on more than a few occasions because, given the child's maturity, "it seems doubtful that more calls would have meant more to her"). Considering what means are available to him to communicate with child Dad has not indicated an intent to forgo his parental role.

C. The court's conclusion that termination is in child's best interests is clearly erroneous. What is the great benefit that severance of Dad's fundamental right to parent will confer upon child. All Petitioners could offer at the hearing was that it would prevent Dad from ever making their guardianship unstable. 3Tr. 43, 45-46. In other words, the benefit to child of termination of Dad's parental rights is elimination of the possibility that, someday, a court might find that it was in child's best interests to be returned to Dad. *See* 18-C M.R.S. § 5-210(4). Such legalism places a minimal gain in "permanence" over a parent and child's familial bond. *See* Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN.L.REV. 423, 454 (1985) (noting how termination cases uniquely focus on "one unconditional relationship" rather than "maintaining family relationships," as in other areas of family law). We are at the point Justice Dana warned of years ago:

> [A child's] need for permanence...cannot by itself support the conclusion that termination of parental rights is in her best interest. If it could, the best interest element would be meaningless and termination would be appropriate whenever

> parental unfitness is found because all children involved in the child protective process need permanence.

In re Michaela C., 2002 ME 159, ¶ 55 (Dana, J., dissenting). It "is particularly true" that a child "in the permanent care of a family member" may "'benefit from preserving a limited relationship with her own natural parent despite the parent's inadequacies.'" *Id.* at ¶ 27 (quoting *In re Hope H.*, 541 A.2d 165, 167 (Me. 1988) (brackets omitted). That is the case here.

One surmises that *all* or *virtually all* guardianships of minors involve parents who, for whatever reason, are currently unable to meet their children's needs. The court's ruling here – that such a guardianship is not good enough for those children – would, if applied in future cases, categorically render the best-interests analysis a foregone conclusion. This is especially true in private adoption cases where termination is necessarily tied to the existence of petitioners who are willing to adopt, rather than the specter of "foster care drift," as in child-protective custody cases. Surely, the Legislature did not intend for such a low bar – one that will be overcome every time it is confronted – when it enacted the probate code.

CONCLUSION

For the foregoing reasons, this Court should vacate the order of termination.

Respectfully submitted,

February 17, 2020

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CERTIFICATE OF SERVICE

Via U.S. Mail, I mailed two paper copies of this brief to the Clerk of this Court, Appellant's (Mom's) counsel, and Appellee's counsel at the addresses listed on the briefing schedule. I emailed a native PDF copy of the brief to lawcourt.clerk@courts.maine.gov and the addresses of the above-noted attorneys as listed in the Board of Bar Overseers' Attorney Directory.